

# **DOMESTIC VIOLENCE:**

## **Best Practices from Prevention to Prosecution**

December 15, 2015  
APAAC Training Center  
Phoenix, Arizona



# **Domestic Violence Tips for Trial Dogs**

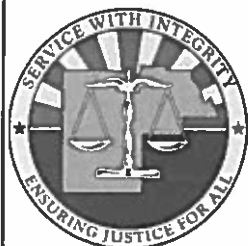
Presented By:

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Distributed By:

**ARIZONA PROSECUTING ATTORNEYS' ADVISORY COUNCIL**  
1951 West Camelback Rd., Suite 202  
Phoenix, Arizona 85015

## Domestic Violence Tips for Trial Dogs DCA John Schneider



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### Topics

- Voir Dire
- Motion Practice
- Theme Based Prosecution
- Educating the trier of fact (DV Experts)
- Forfeiture by Wrongdoing
- Rule 806
- Victim Testimony



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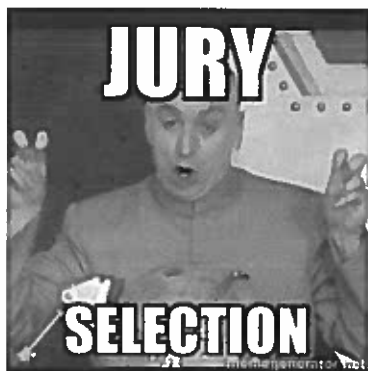
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## Voir Dire

- Who will be resistant to the facts of this case?
- What are the problems in your case?
  - Recanting victim
  - Victim with priors
  - Bad investigation
  - Bad facts
  - Officer with integrity file
  - Witness Baggage

SUMMONS  
FOR JURY  
SERVICE




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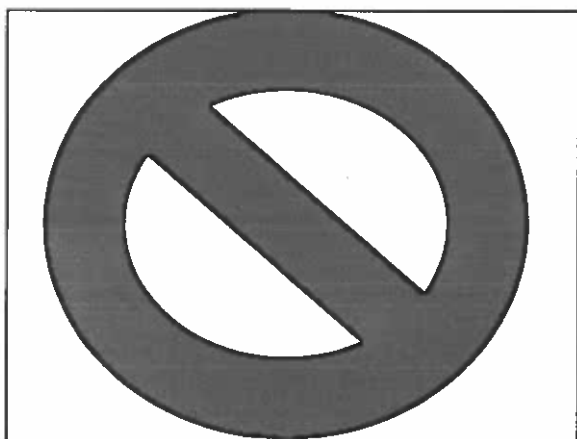
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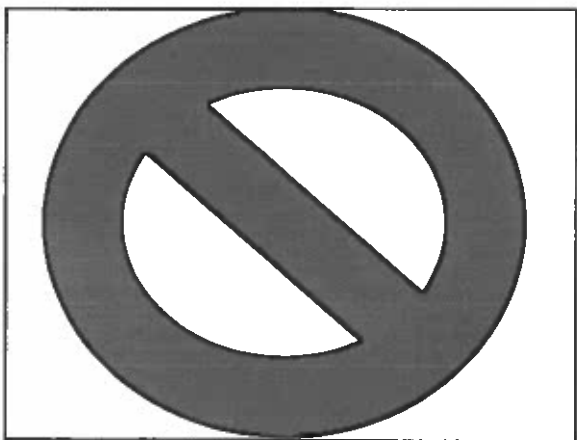
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- Anyone agree with this statement, "Domestic violence is often blown out of proportion by the police and criminal justice system"
- Is there anyone who feels that it's wrong for the government to get involved in a domestic violence case?
- In Arizona the law views all assaults the same, whether or not the parties are related. Does anyone think those assaults should not be treated the same as other assaults?

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- Do any of you think that a woman who has been hit by her partner probably deserved it? Provoked it?
- Is there anyone here who believes that if a victim does not agree with prosecution, the state should not proceed with the case?
- Is there anyone here who cannot think of a reason that a victim would not want to prosecute her partner?
- How many of you think that if a victim asks that the charges be dropped that the State should automatically do so?

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- If the State proves the Defendant guilty beyond a reasonable doubt, are there any of you who would still vote not guilty solely because the victim did not testify, or testified for the defendant?
- How many of you think that it is impossible for the victim to still care for the batterer after the abuse is over?
- Do any of you feel it is okay to beat someone up because of things they say to you?
- Do any of you believe that you possess any psychic abilities?

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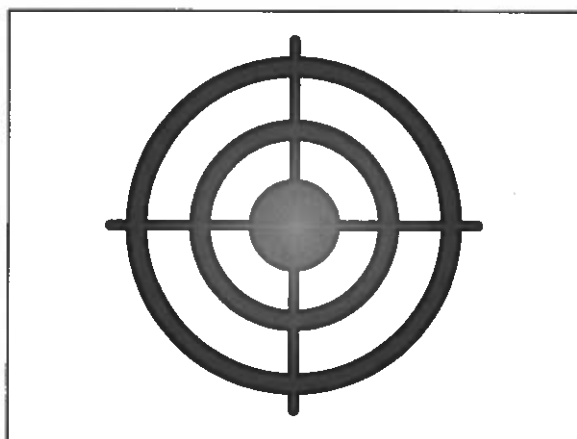
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## Themes

What is your case about?

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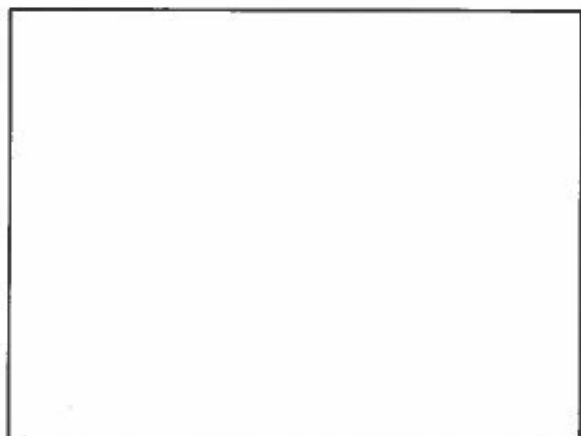
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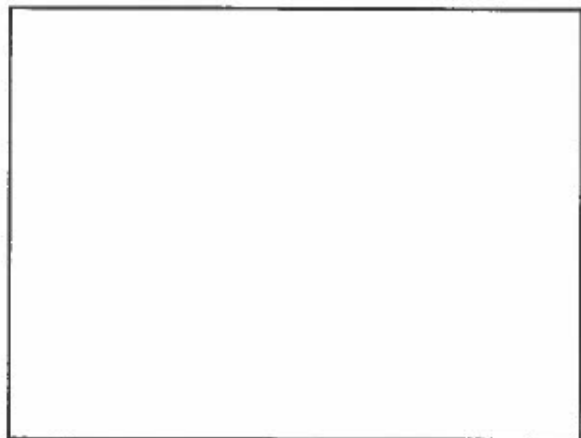
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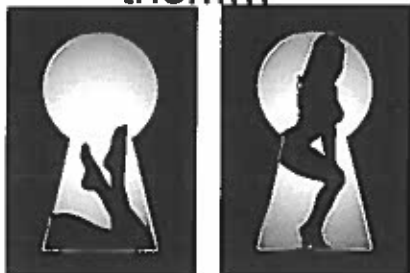
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He wanted to catch  
them...



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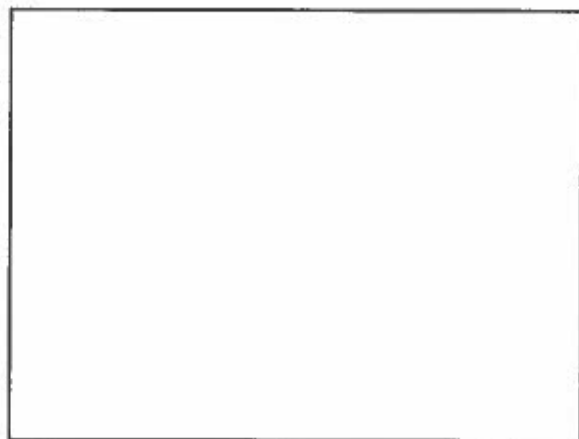
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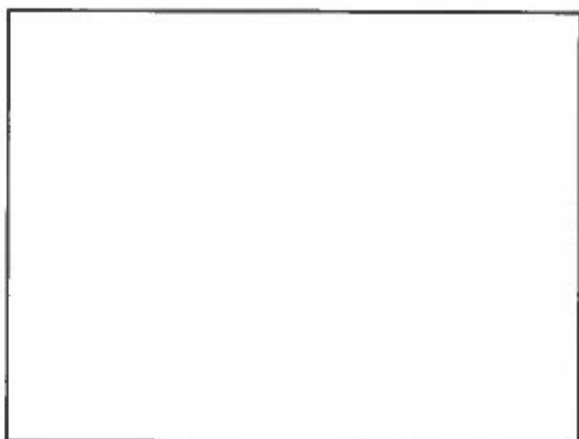
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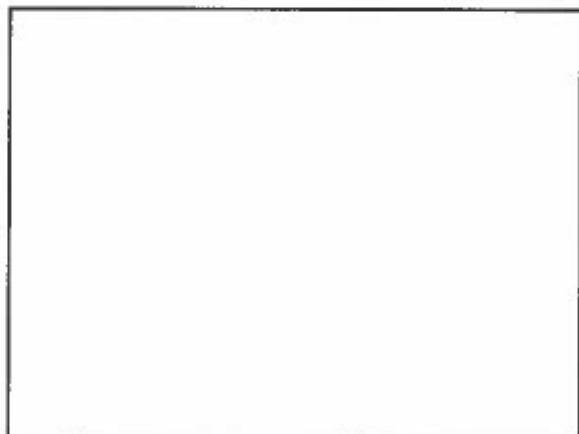
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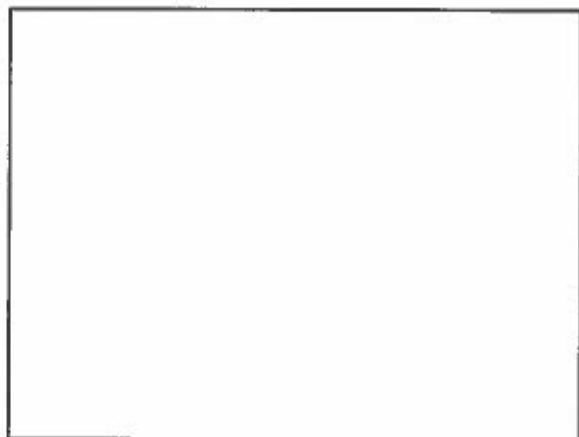
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## Motion Practice



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## Pretrial Litigation

- **Motion in Limine to exclude**
  - A.R.S. § 13-503
  - Victim's Arrest
  - Witness' addiction
  - Δ's self serving hearsay
  - Abortion
- **404(b)**
  - Other DV
  - Consolidate cases
- **Bench Brief in Support**
  - Admissibility of Evidence
  - *State v. Hill*, 236 Ariz. 162, 336 P.3d 1283 (Ct. App. 2014)

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## Pretrial Litigation

- **Motion in Limine (to exclude)**
  - Be mindful of timelines
  - Still can object in trial. Avoids a lengthy sidebar
  - Be strategic
    - MILE to exclude V's alcoholism
    - Rebut defense attack on V's credibility with other acts of DV
    - Filing the motion may weaken overall case
- **Bench Brief in support**
  - V's statements were excited utterances
  - V's statements were present sense impressions




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## 404(b)

- "Other acts evidence" ≠ 'prior bad acts'
- Rule requires notice 45 days prior to trial
- Evidentiary hearing?
  - *State v. Terrazas*, 189 Ariz. 580, 944 P.2d 1194 (1997)
  - *State v. LeBrun*, 222 Ariz. 183, 213 P.3d 332 (Ct. App. 2009), as amended (July 17, 2009)
  - Be Strategic
    - Crawford issues?
    - Rule 5.3 & 5.4 Crim Pro
    - Rule 104(a) of Rules of Evidence
  - Plea deadline




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## Others

- **Motion to Strike**
  - Listed Defense
  - Defense pleading untimely
- **Proposed Voir Dire**
- **Sentencing Recommendation**
- **Proceed in Absentia**
- **Responses to defense**
  - Suppress
  - Remand
  - Dismiss




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- **Time**
  - Rule 16(b): “All motions shall be made no later than 20 days before trial...”
  - “Opposing party shall have 10 days...to file a response”
    - Rule 16(b) & Rule 35.1
  - 3 days to file a reply
- **Page limits**
  - Rule 35: Form, Content, and Service
  - 10 page limit on motions (minus attachments). Rule 35.1(b)
  - Reply 5 page limit. Rule 35.1(b)
- **No right to Oral Argument. Rule 35.2**

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- **Filing**
  - Filing of motions are governed by Rule 5 of Rules of Civil Procedure. Rule 35.5
  - “The filing of pleadings and other papers with the court as required by these Rules shall be made by filing them with the clerk of the court, except that the judge may permit the papers to be filed with the judge and in that event the judge shall note thereon the filing date and forthwith transmit them to the office of the clerk.” Rule 5h Rules of Civil Procedure.
- **Computation of Time**
  - In periods longer than 24 hours:
    - day of filing NOT included
    - Last day is included unless Sat/Sun/Holiday if so, next business day

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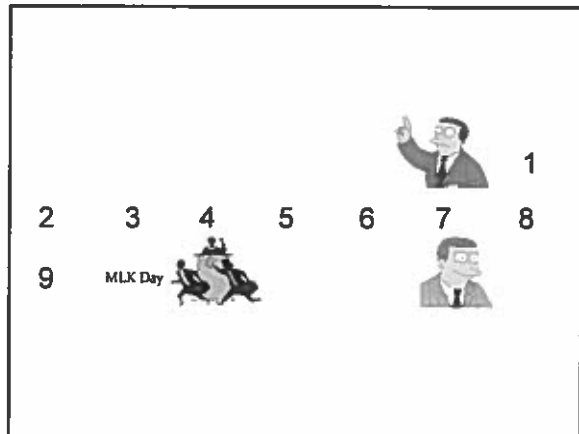
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- **Computation of Time Rule 1.3**
  - If service done in a manner authorized by Rule 5(c)(2)(C) OR (D) of Rule of Civ Pro:
  - 5 calendar days shall be added
  - Mailing pursuant to Rule 5(c)(2)(C) includes every type of service except same day hand delivery
- You get 15 days unless same day hand delivery

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### Educating the Trier of Fact

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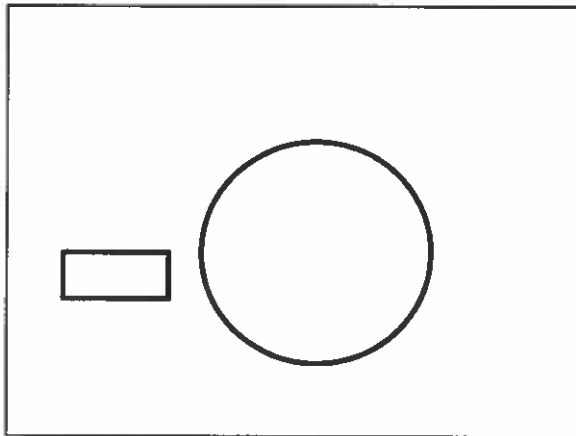
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### **Witness Testimony**

**Q. How many times have you investigated a case where a DV victim recanted?**

**A. Anything other than none!**

- **Rules 701, 702, & 704**

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### **DV Expert**

- **Even need one?**
- **Preparation**
- **Direct & redirect**
- **Opening and Closing**

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## DV Expert

- Find One
- “Cold” vs. Consulting
- Notice him/her
- Expect a long interview
- Know the limits
- Get copy of CV

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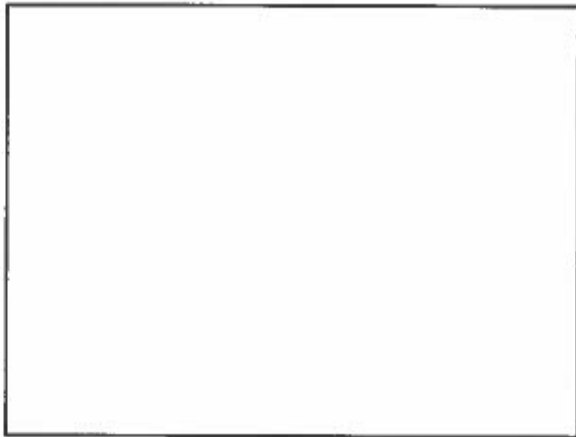
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## Want vs. Need



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### Does it Make Sense?

- Delayed or not reporting
- Changing their story or missing information
- Recantation
- Going back or repeated contact with abuser
- Why don't they leave?

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### Witness Preparation



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### Opening



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## DV Expert

### I. Introduction

- a. Training, education, experience
- b.  $\Pi$  &  $\Delta$  work
- c. \$\$\$
  - i. "Do you work for free"
  - ii. "Do your opinions change based on who is paying?"

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## DV Expert

### I. Introduction

- d. CV
- e. Introduce CV
  - i. Lectures/trainings given
  - ii. Articles published
  - iii. CLEs

### II. DV experience

- a. # of years/cases

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## DV Expert

### II. DV experience

- a. # of years/cases
- b. Familiar with dynamics of DV relationships
  - i. Cycle of Violence
  - ii. Recantation/Minimization/Etc.
  - iii. Coercive Control

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## DV Expert

III. Cycle of Violence

IV. Recantation/Minimization/Etc.

V. Coercive Control

VI. Applicable Research Studies

Nothing about current case

VII. This Case

- a. The victim in this case...
- b. Is that an example of XXX

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## Closing




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- Embarrassment: fear judgment of others
- Shame: *"how did I let this happen?"*
- Feeling responsible for the situation: *"If I was just a better..."*
- Denial: hope that it will get better
- Minimization: excuses; self blame
- Fear of retaliation or Isolation
- Fear of not being believed or being blamed
- Fear of Law Enforcement and/or Criminal Justice Response
- Lack of Reality Check: *"thinking they are the only one"*
- Situation not consistent with their public image

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## DV Experts

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**(602) 496-1193**

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## Pleadings

- Cite the research!
- Women are killed by intimate partners more often than by any other category of killer.
- Intimate partner homicides make up 40 to 50 percent of all murders of women in the United States.
- In 70 to 80 percent of intimate partner homicides, no matter which partner was killed, the man physically abused the woman before the murder.

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## Forfeiture by Wrongdoing

- A defendant's right to confront a witness against him is waived when his conduct was designed to prevent the witness from testifying
- No victim prosecution
- Victim/Witness refuses to testify. Rule 804(a)(2)
- Introduce victim/witness statement(s), recorded interviews, etc.



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## Forfeiture by Wrongdoing

- *Giles v. California*, 554 U.S. 353 (2008)
- *State v. Franklin*, 232 Ariz. 556, 307 P.3d 983 (Ct. App. 2013)
- Rule 804(6)
- Doctrine Requires:
  1. Witness Unavailability
  2. Wrongdoing
  3. The Defendant Engaged or Acquiesced
  4. The Defendant Intended to, and did, Procure Unavailability
    - Proven by a preponderance of the evidence

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## Forfeiture by Wrongdoing

- Need a witness to lay foundation...
  - Recordings
  - Interviews (recorded or not)
  - Prior statements
- Right to cross is forfeited
- Right to object to hearsay is forfeited
- Statements may still be attacked for credibility and impeachment purposes. Ariz. R. Evid. 806.
- Declarant's priors may be introduced just as if that declarant had been present and testified at trial.
  - *State v. Hernandez*, 191 Ariz. 553, 557, 959 P.2d 810, 814 (Ct. App. Div. 1, 1998)

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## Rule 806

- Declarant may be attacked and then supported by any evidence that would be admissible if the declarant had testified as a witness
- Case Study, Arizona v. Fausto
  - V cooperative with police
  - V implicates Δ in Kidnapping and Aggravated Assault
  - V FTA for court despite subpoena
  - Mid-trial V left voicemail message for prosecutor that she lied about everything
  - Defense impeached V's excited utterances with VM
  - State rehabilitated V with her audio interview with police

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## Rule 806

- Declarant may be attacked and then supported by any evidence that would be admissible if the declarant had testified as a witness
- Will work in any case where witnesses' credibility is attacked and you have audio, video, Facebook, etc. of declarant's statements

*State v. Ruggiero*, 211 Ariz 262, 120 P.3d 690 (2005)

- Not only government's rule
- Defense can use as well

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## Victim Testimony

- Think of it like a cross exam
- Write a cross examination like you would for Δ
- Anticipate recantation, minimization, denial
- **NEVER** expect cooperation until after redirect
- Be ready to impeach at any moment
- Typically know at start of direct
- Hostile witness
  - Rule 611(c)(2)
  - Need to lay foundation

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- Happy to be here?
  - Refused to follow your subpoena
  - You failed to appear at court last week
  - Lately been avoiding MCAO
- For the past year
  - We used to communicate regularly
  - You came to MCAO in February 2015
  - Met with me
  - You were in agreement with prosecution
  - 8 times you emailed asking about the case status
- You attended court on 7/23/15
  - Sat on Victim's side
  - You were in agreement with prosecution
  - You said the things the Δ said in court were lies
  - Now, you disagree with prosecution
  - Agree you have done a 180 degree change since 7/23/15

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## Victim Testimony

Don't forget

- Body language
- Tone and/or emotion
- Witness' attitude
- Have Court declare a hostile witness
  - Rule 611(c)(2)
  - Make a record (if necessary)
- Can use leading questions
  - Move right into cross examination

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## Victim Testimony




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## Victim Testimony

"I don't recall"      "I don't remember"

- Claimed failure of recollection
- 2 options
  1. Refresh recollection. Rule 612
  2. Impeach the witness

*State v. King*, 180 Ariz. 268, 883 P.2d 1024, 1031 (1994)

*State v. Robinson*, 165 Ariz. 51, 796 P.2d 853, 860 (1990)

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## Victim Testimony

"A claimed inability to recall, when disbelieved by the trial judge, may be viewed as inconsistent with previous statements...."

*State v. King*, 180 Ariz. 268, 275, 883 P.2d 1024, 1031 (1994)

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## Refreshing recollection

- Never do it if the witness is lying
  - Go right to impeachment
- If you do it, be nice
- Don't hesitate to perform, the jury is watching
- Can always refresh on cross, but remember to lead the witness

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## Impeachment

- Art not science
- The jury is watching
- Have a method and stick to it
  1. Confirm statement on direct
  2. Build up prior statement
  3. Confront with prior statement

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Q: Did you just testify that the Δ did not hit you?  
 Q: Are you sure about that?  
 Q: Do you consider yourself a truthful person?  
 Q: If you are telling us the truth today, and you ever described \_\_\_\_ you never would have said the Δ hit you?

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Q: You spoke with Tempe police that night?  
 Q: You were crying? Emotional?  
 Q: You asked for help?  
 Q: You wanted to get away from the Δ?  
 Q: In fact, you ran out of the house?  
 Q: You told Ofc. Jones the Δ attacked you?

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• Stay focused, maintain control of the witness  
 Q: You asked for help?  
 A: I was lying  
 Q: I didn't ask why you asked for help, but you did didn't you?  
 • DO NOT MOVE ON until the witness answers your question

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**DO NOT ASK:**

Q: So, is Officer Jones lying?

"Arizona prohibits testimony from an expert or a lay witness that opines as to the truthfulness of a statement by another witness."

*State v. Martinez*, 230 Ariz. 382, 385, 284 P.3d 893, 896 (Ct. App. 2012)

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**DO NOT ASK:**

Q: Were you lying then, or are you lying now?



**DISASTER**

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- Don't forget about redirect
- Difficult witness on direct, but cooperative on cross (with Δy)

Q: Why so easy to answer Δy's questions, but difficult for you to answer mine?

Q: How many times did you meet with Δy prior to trial?

Q: What did you two discuss?

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Q: Do you often call 911 when  
"nothing happens"?

Q: Who paid the rent?

Q: How has it been running the house  
without the Δ?

- Ask about jail calls (if applicable)
- Ask about investigation follow-up (if applicable)

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### Caselaw Gems

- "Mutual combat" is not a defense to assault  
– *State v. Mace*, 86 Ariz. 85, 340 P.2d 994 (1959)
- It is proper for a court to take judicial notice of its own file  
– *In re Sabino R.*, 198 Ariz. 424, 10 P.3d 1211 (2000)
- Text messages are not always hearsay  
– *State v. Chavez*, 225 Ariz. 442, 239 P.3d 761 (2010)
- Witness interview times must be reasonable. Mon-Fri 8 am-6 pm "reasonable"  
– *State ex rel. McDougall v. Mun. Court of City of Phoenix*, 155 Ariz. 186, 745 P.2d 634 (Cl. App. 1987)

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- Ok to impeach witness with prior use of an alias  
– *State v. Hooper*, 145 Ariz. 538, 703 P.2d 482 (1985)
- Photographs may be used to prove the corpus delecti, to identify the victim, to show the fatal injury, to determine the atrociousness of the crime, to corroborate witnesses, to illustrate testimony, or to corroborate the State's theory of the crime  
– *State v. Hampton*, 213 Ariz. 167, 173, 140 P.3d 950, 956 (2006)
- Transcripts used contemporaneously with the admission of the recordings into evidence, are admissible to assist the jury in following the recordings while they are being played.  
– *State v. Tomlinson*, 121 Ariz. 313, 319, 589 P.2d 1345, 1351 (Cl. App. 1978)

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- Ok for court to consider inadmissible evidence at sentencing
  - *United States v. Schipani*, 435 F.2d 26 (2d Cir. 1970)
  - *State v. Benge*, 110 Ariz. 473, 520 P.2d 843 (1974)
- Lost wages and travel expenses to attend trial are recoverable as restitution (even if not subpoenaed)
  - *State v. Guadagni*, 218 Ariz. 1, 178 P.3d 473 (Ct. App. 2008)
- When rules of criminal procedure conflict with local rules, criminal procedure rules trump
  - *State v. Brown*, 182 Ariz. 66, 67, 893 P.2d 66, 67 (Ct. App. 1995)

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